No. 10810

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LAWRENCE R. GREEN, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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CITATIONS

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OPINIONS BELOW

The opinions in the Tax Court (R. 20–38) are reported in 3 T. C. 74.

JURISDICTION

This case involves the taxpayer's income tax liability for the calendar year 1939. The notice of deficiency is dated August 16, 1941 (R. 11), and the taxpayer's petition for redetermination was filed with the United States Board of Tax Appeals on November 12, 1941 (R. 1). The jurisdiction of the Board of Tax Appeals (whose name was changed by Section 504 of the Revenue Act of 1942 to the Tax Court of the United States) rested upon Section 871 of the Internal Revenue Code. The decision of the Tax Court

was entered on February 16, 1944 (R. 39), and the petition for review was filed on May 5, 1944 (R. 66–72). The jurisdiction of this Court rests upon Sections 1141–1142 of the Internal Revenue Code.

QUESTION PRESENTED

The taxpayer was a transferee of the estate of his deceased father and in 1939 paid a portion of a deficiency in estate tax asserted by the Commissioner against the estate, together with interest thereon. Is the taxpayer entitled to a deduction under Section 23 (b) of the Internal Revenue Code for the interest so paid?

STATUTE INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 23.)

SEC. 900. TRANSFERRED ASSETS.

(a) *Method of collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and

proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a decedent, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this subchapter.

* * * * *

(e) *Definition of "transferee".*—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee. (26 U. S. C. 1940 ed., Sec. 900.)

STATEMENT

The facts as stipulated by the parties and found by the Tax Court may be summarized as follows:

The taxpayer and his brother, Ralph J. Green, were the residuary beneficiaries, in equal shares, of the estate of their deceased father. The taxpayer was the executor of the estate, which was probated in Johnson County, Kansas. The final report of the executor was filed on September 4, 1931, showing that all specific bequests had been paid and asking for an order for final distribution to the residuary beneficiaries and discharge of the executor. The final distribution was accomplished and on October 13, 1931, the executor was discharged and given a full and complete release. No assets were retained in the estate. (R. 22, 40–41.)

After the final settlement of the estate the Commissioner asserted a deficiency in estate tax liability, and the matter was finally settled by the taxpayer and his

brother paying, in 1939, a deficiency in the amount of $17,244.81, together with interest (computed to July 8, 1939) as provided by law in the amount of $8,286.01. Each of them paid one-half of the total amount. (R. 23, 41.)

The amount received by the taxpayer from the estate of his father was greatly in excess of the amount of designated interest paid by him and there is no claim or any suggestion of claim that the amount received by him did not also exceed the total of the tax and interest which he paid. (R. 23–24, 42.)

In his income tax return for 1939 the taxpayer deducted $4,143.01 as interest paid on the estate tax deficiency of his father's estate. The Commissioner disallowed the deduction. (R. 14.) The Tax Court held that the taxpayer was not entitled to deduct that portion of the interest referable to the period prior to the date of distribution of the estate, but that he was entitled to deduct that portion of the interest referable to the period subsequent to the distribution. (R. 20–34.) Four judges dissented, taking the view that the taxpayer was not entitled to any part of the claimed deduction.[1] (R. 34–38.)

STATEMENT OF POINTS TO BE URGED

The assignments of error, all of which are here relied upon, appear in the record at pages 70–71. They

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[1] The Tax Court made the same ruling with respect to the similar deduction claimed by Ralph J. Green, brother of the taxpayer herein. That case is now pending on the Commissioner's appeal in the Eighth Circuit.

may be summarized by a statement that the Tax Court erred in holding that the taxpayer is entitled to the claimed deduction.

SUMMARY OF ARGUMENT

No part of the claimed deduction is allowable because the interest for which the deduction is claimed was not paid upon any indebtedness of the taxpayer. The taxpayer was under no personal liability for either the tax or interest thereon owing by ~~its~~ his transferor~~s~~, but was merely in the position of having received property of a debtor which ~~it~~ he was not entitled to keep as against creditors; the liability was in no sense one to pay the tax or interest, but was simply one to disgorge. These principles had long been well settled prior to the introduction of the statutory provisions relating to transferees and it seems to be impliedly conceded that unless these statutory provisions have worked some change in the nature of a transferee's liability, no part of the deduction at issue is allowable. However, it has also been long and well settled that these statutory provisions have not made any change whatsoever in the nature of a transferee's liability, but have simply provided an administrative remedy for the enforcement of that liability if it otherwise exists. And there is nothing in the legislative history of the statutory provisions relating to transferees which would support in the slightest degree a departure now from the settled understanding of their meaning, nature and effect.

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ARGUMENT

The taxpayer is not entitled to the claimed deduction

1. The taxpayer's claim for the deduction rests on Section 23 (b) of the Internal Revenue Code, *supra,* which allows a deduction for "interest paid or accrued within the taxable year of indebtedness". Since the claim is for a tax deduction, the section must be strictly construed against the taxpayer who must show that he comes plainly and squarely within the terms of the provision. *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46; *John Wanamaker Philadelphia* v. *Commissioner,* 139 F. 2d 644, 646 (C. C. A. 3d), and cases there cited.

At the outset it should be observed that for a deduction to be allowable under Section 23 (b) the indebtedness upon which the amount has been paid "must be the taxpayer's indebtedness, not that of someone else". *Scripps* v. *Commissioner,* 96 F. 2d 492, 495 (C. C. A. 6th), certiorari denied, 305 U. S. 625. This principle is fundamental and has been applied in numerous situations. Thus one who pays interest on a mortgage on a home taken in his wife's name and on a loan made by his wife on an insurance policy is not entitled to a deduction therefor.[2] A corporation may not deduct interest paid by it on an obligation of its shareholders even though the money borrowed by the shareholders was for the use of the corporation.[3] The deduction is not allowable even where the interest is paid pur-

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[2] *Colston* v. *Burnet*, 59 F. 2d 867 (App. D. C.), certiorari denied, 287 U. S. 640.

[3] *Morris Plan Co. of Binghamton* v. *Commissioner*, 26 B. T. A. 772; see also *Griffin* v. *Commissioner*, 7 B. T. A. 1094, and *Peoples Bank* v. *Commissioner*, 43 B. T. A. 589.

suant to a binding contract entered into for good consideration, unless the obligation to pay extends to the principal of the debt as well as to the interest.[4] In such cases, no matter what they are called, the payments are not deductible interest under Section 23 (b) for they are not on the taxpayers' indebtedness.[5]

2. The majority opinion below does not dispute the rule that a deduction is not allowable under Section 23 (b) unless the interest is paid on the taxpayer's own indebtedness. (R. 28.) It takes the view, however, that so much of the interest as was referable to the period after the taxpayer acquired the assets of the transferor-estate *was* interest in the taxpayer's own indebtedness. We think that this view rests upon a fundamental misconception of the nature of a transferee's liability. In essence it is to say that a transferee is a taxpayer within the meaning of the statute and when he pays a tax asserted against his transferor he is paying his own tax, and the interest thereon is in-

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[4] *Wood* v. *Rasquin*, 21 F. Supp. 211 (E. D. N. Y.), affirmed *per curiam*, 97 F. 2d 1023 (C. C. A. 2d); *Orange Securities Corp.* v. *Commissioner*, 45 B. T. A. 24, affirmed, 131 F. 2d 662 (C. C. A. 5th); *Simon* v. *Commissioner*, 36 B. T. A. 184. The deduction was disallowed in all of these cases to the payor of the interest because his obligation extended only to payment of the interest and not to payment of the principal of the debt.

[5] We have been able to find only one situation in which a deduction for interest is allowable to one who is not personally liable on the principal debt; the case where an owner of property subject to a mortgage pays the interest on the mortgage. E. g., *New McDermott, Inc.* v. *Commissioner*, 44 B. T. A. 1035. But this is based on an express provision which has been in the regulations from the beginning. See Article 121 of Treasury Regulations 45, promulgated under the Revenue Act of 1918, and Section 29.23 (b)-1 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

terest on his own indebtedness.[6] The Tax Court predicates this position upon Section 900 of the Internal Revenue Code, *supra,* contending that this section imposes such a liability upon the transferee. And it seems to concede impliedly that without this section to rely upon no part of the deduction here claimed would be allowable. However, as the dissenting opinions by Turner, J. in the instant case and in *Koppers Co.* v. *Commissioner,* 3 T. C. 62, point out, the fallacy in such a position lies in the assumption that any liability is imposed by Section 900, for that section imposes no liability on anyone. It simply provides a remedy for the enforcement of a liability if that liability otherwise exists.

Long prior to the enactment of the transferee provisions, which first appeared as Sections 280 and 316 of the Revenue Act of 1926,[7] the Government proceeded against transferees on the principle that when the assets of a debtor are transferred to one other than a bona fide purchaser for value without satisfying the

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[6] The views of the judges of the Tax Court on the question here presented are expressed in the opinions herein and in *Koppers Co.* v. *Commissioner*, 3 T. C. 62, pending in the Third Circuit. The Tax Court has followed its decisions in these cases in *Collins* v. *Commissioner*, decided March 13, 1944 (1944 P-H T. C. Memorandum Decisions Service, par. 44,079), pending in this Court; *Estate of Henderson* v. *Commissioner*, decided December 14, 1943 (1943 T. C. Memorandum Decisions Service, par. 43,505), pending in the Fifth Circuit; and *Breyer* v. *Commissioner*, decided January 20, 1944 (1944 P-H T. C. Memorandum Decisions Service, par. 44,015), pending in the Third Circuit.

[7] Section 280 dealt with collection of income taxes and Section 316 with collection of estate and gift taxes from transferees. These are now Sections 311 (income tax), Section 900 (estate tax) and Section 1025 (gift tax) of the Internal Revenue Code.

claims of creditors, the creditors may collect their debts from the assets so transferred. This is the so-called "trust fund doctrine" which has sometimes been linked with the doctrine of fraudulent conveyances. See *McIver* v. *Hardware Co.,* 144 N. C. 478, 57 S. E. 169, and *Luedecke* v. *Des Moines Cabinet Co.,* 140 Ia. 223, 118 N. W. 456. The Government proceeded under this doctrine by a suit in equity. See *Phillips* v. *Commissioner,* 283 U. S. 589, 592, note 2. The Government may still proceed in that manner if it chooses. *Phillips-Jones Corp.* v. *Parmley,* 302 U. S. 233, 237. And a typical instance in which such a suit in equity would lie is that which is here involved: the collection from distributees of a decedent's estate of taxes owing by the estate. *Neustadter* v. *United States,* 90 F. 2d 34 (C. C. A. 9th).

Thus the fundamental nature of the transferee's liability is not in any proper sense a liability for the tax, but is simply a liability to disgorge, to return property in his possession which he is not entitled to keep as against creditors of the transferor. The transferee stands in a position similar to that of a trustee. Of course no creditor may receive more than his debt, and so the liability of the transferee to disgorge is limited to the amount to which the Government is entitled, namely, the tax and interest or other additions thereto owing by the transferor. And since the liability is not one to pay the tax, but merely to return property, the transferee's liability is also limited to a return of the property which he has received. The transferee's liability is thus limited in two ways:

(a) by the amount due the Government and (b) by the amount received by the transferee, whichever is less. 9 Mertens, Law of Federal Income Taxation, Sec. 53.39.

An additional problem is raised where the transferee receives an amount less than that due the Government, but has had the benefit of the use of that amount for some period of time. The rule applied by the Tax Court in such circumstances (following *United States* v. *Snook,* 24 F. 2d 844 (N. D. Ga.), reversed on another ground *sub nom. Austin* v. *United States,* 28 F. 2d 677 (C. C. A. 5th)), is to hold the transferee liable for the amount received, plus interest thereon from the date the assets were received at the prevailing legal rate under local law. *Buzard* v. *Commissioner,* 29 B. T. A. 981, 983–984, modified in 77 F. 2d 391 (App. D. C.). However, the fact that there is a duty to pay what may be denominated as "retention interest" in no way affects the *nature* of the transferee's liability, which, as we have pointed out, is simply one to disgorge. The obligation to pay retention interest is significant only with respect to the measure of the liability, not to its nature. Retention interest is the price paid by the transferee for retaining and using funds to which he was not entitled. It is not the same as the interest due on the transferor's tax. In any event no retention interest is involved in this case for there is no suggestion here that the taxpayer received from his transferor less than the tax and interest which he subsequently paid to the Collector. Therefore, even if it should be assumed that

retention interest would be a proper deduction under Section 23 (b),[8] that would have no bearing upon the instant case.

Unless the transferee provisions of the Revenue Acts have worked some change in the nature of a transferee's liability, it would seem to be beyond question that the interest for which the taxpayer here claims a deduction was not interest paid on his own indebtedness; the taxpayer simply returned property which he was not entitled to keep and the measure of what he was required to return was the amount owing by his transferor. And it has long been well settled that these provisions of the statute in no way affect the nature or extent of the pre-existing liability of transferees and do not impose any new liability. See *Phillips* v. *Commissioner, supra; Phillips-Jones Corp.* v. *Parmley, supra;* and the cases cited in note 3 of Judge Turner's opinion in the *Koppers* case.

Experience had shown that a suit in equity or an action at law to enforce payment by a transferee was a cumbersome remedy and was not very efficacious. There was need for an administrative method by which the Commissioner could proceed in transferee cases. And the only purpose of Sections 280 and 316 of the Revenue Act of 1926 and corresponding sections of the subsequent Acts is simply to provide such an administrative remedy. In order for the Commissioner to proceed under these provisions it is necessary

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[8] This view is taken in Judge Turner's dissenting opinion in the *Koppers* case.

that the liability exist independently of them. *Phillips* v. *Commissioner, supra,* pp. 592, 593.[9]

It is true that this administrative method for enforcing a transferee's liability is similar, though by no means identical,[10] to that available for enforcing a taxpayer's liability. Thus in the procedural sense the transferee might be described as a taxpayer. But it is obviously specious to argue from this that the transferee is therefore substantively a taxpayer when he is called upon to disgorge in order to satisfy his transferor's tax liability.

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[9] See S. Rep. No. 52, 69th Cong., 1st Sess., p. 30 (1939–1 Cum. Bull. (Part 2) 332, 354):

"Under existing law proceedings for the enforcement of liabilities such as those heretofore discussed are solely by court proceedings. No proceeding before the Board for the redetermination of a deficiency and for the ultimate enforcement by assessment and distraint may be had.

"It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the Act for the enforcement of tax deficiencies. It is not proposed, however, to define or change existing liability. The section merely provides that if the liability of the transferee exists under other law then that liability is to be enforced according to the new procedure applicable to tax deficiencies."

See also the report of the Conference Committee on the Revenue Act of 1926, referred to later herein.

[10] The Commissioner has the burden of proving the liability of the transferee, although not that of the taxpayer-transferor. He must show that the transfer was without adequate consideration and that he has exhausted his remedies, or that no adequate remedy exists, against the transferor. He frequently fails to sustain the burden. E. g., *Weil* v. *Commissioner*, 91 F. 2d 944 (C. C. A. 2d); *Burke* v. *Commissioner*, 21 B. T. A. 45; *Limroth* v. *Commissioner*, 22 B. T. A. 595; *Davis* v. *Commissioner*, 24 B. T. A. 36; *Goldman* v. *Commissioner*, 24 B. T. A. 915; *Roth* v. *Commissioner*, 26 B. T. A. 631; *American Feature Film Co.* v. *Commissioner*, 24 B. T. A. 18; *Harjo* v. *Commissioner*, 34 B. T. A. 467.

3. The question here involved has recently been before the Tenth Circuit and in a well reasoned opinion that court sustained the Government's position. *Koch* v. *United States,* 138 F. 2d 850. We submit that that decision is correct and should be followed.

Prior to its decision in the instant case the Tax Court had itself, following the principles upon which we rely, held that a transferee is not entitled to any part of such a deduction as is here claimed. In *Sulzberger* v. *Commissioner,* 33 B. T. A. 1093, the deduction was disallowed to beneficiaries of an estate who as transferees had paid deficiencies in estate taxes. In *Brown* v. *Commissioner,* 1 T. C. 225, the deductions were disallowed to legatees who paid a deficiency in gift tax due from their decedent. See also I. T. 3156, 1938–1 Cum. Bull. 213, and *Automatic Sprinkler Co. of America* v. *Commissioner,* 27 B. T. A. 160.

Scripps v. *Commissioner,* 96 F. 2d 492 (C. C. A. 6th), certiorari denied, 305 U. S. 625, which the Tax Court cites (R. 28), is plainly distinguishable. In that case a trust which had been created by the decedent during his lifetime, and which was includible in his gross estate for estate tax purposes, was allowed a deduction for interest paid on the estate tax, but this result was rested expressly on Section 315 of the Revenue Act of 1926, which provided that in such circumstances "the trustee shall be personally liable for such tax", and imposed a lien on the property. The correctness of *Toy* v. *Commissioner,* 34 B. T. A. 877, upon which the majority below also

rely, is open to doubt.[11] But its soundness need not be examined for it is also distinguishable. In that case the Government had proceeded successfully against the administrators of an estate, both in their representative capacities and in their individual capacities to collect an estate tax deficiency. The Board allowed the deduction for some (though not all) of the interest paid, but rested its decision expressly on the narrow ground that under Section 3467 of the Revised Statutes the administrators were personally liable for the tax, pointing out (p. 883) that if their liability to the Government had rested only upon their status as transferees, the deduction would not be allowable. None of the other cases, cited by the majority below in the instant case or in the *Koppers* case, enunciates any principles at variance with those upon which we rely. Indeed, in so far as these cases are in point at all, they support our position.[12]

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[11] See the dissenting opinion herein. (R. 36.)

[12] *Robinette* v. *Commissioner*, 139 F. 2d 285 (C. C. A. 6th), certiorari denied May 22, 1944; *Commissioner* v. *Bebee*, 67 F. 2d 662 (C. C. A. 1st); *O'Brien* v. *Commissioner*, 47 B. T. A. 561; *Estate of Morrell* v. *Commissioner*, 43 B. T. A. 651; *Continental Baking Co.* v. *Commissioner*, 27 B. T. A. 884, affirmed, 75 F. 2d 243 (App. D. C.), certiorari denied, 295 U. S. 756; *C. P. Ford & Co.* v. *Commissioner*, 28 B. T. A. 156; *Watson* v. *Commissioner*, 25 B. T. A. 971; *Wayne Body Corp.* v. *Commissioner*, 24 B. T. A. 524; *Fostoria Milling & Grain Co.* v. *Commissioner*, 11 B. T. A. 1401; *Garcin* v. *Commissioner*, 22 B. T. A. 1027.

Penrose v. *United States*, 18 F. Supp. 413 (E. D. Pa.), was not dealt with as a transferee case, and simply held that payments made by a testamentary trust should be treated as though they had been made by the decedent's estate. On the point upon which it was decided, the *Penrose* case is contrary to *Jones* v. *Hassett*, 45 F. Supp. 195 (Mass.).

In the instant case the Tax Court overruled its prior decisions in the *Sulzberger* and *Brown* cases, and in the *Koppers* case it expressly refused to follow the decision of the Tenth Circuit in *Koch* v. *United States, supra,* on the ground that the court had not considered the legislative history of the transferee provisions. We, of course, do not suggest that the Court should not seek every aid in the interpretation of the statute. Cf. *Harrison* v. *Northern Trust Co.,* 317 U. S. 476, 479. But we do wish to call to the Court's attention that the Tax Court has in no manner connected the intention which it has distilled from the committee reports with any part of the statute. It has given no indication as to which words in Section 316 of the 1926 Act can be construed to impose any liability upon the transferee for any part of such interest as is here involved.

A remedy is provided by Section 316 for enforcement of the liability "of a transferee of property of a decedent" for the tax "imposed by this title". The only tax "imposed by this title" is the estate tax which is levied upon the decedent's estate and attaches to the estate before distribution; no tax is levied upon the transferee.[13] And that tax, which is "imposed upon" the estate is expressly defined to include "interest, additional amounts and additions to the tax provided by law". We can perceive no ambiguity in the language of the statute or any way in which its language can be construed to impose any personal liability for tax or interest upon the transferee.

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[13] *New York Trust Co.* v. *Eisner*, 256 U. S. 345; *Riggs* v. *Del Drago*, 317 U. S. 95; cf. *knowlton* v. *Moore*, 178 U. S. 41.

In any event analysis of the legislative history shows that there is nothing therein which even remotely supports the Tax Court's conclusion. As the Bill which became the Revenue Act of 1926 passed the House it contained no provisions relating to transferees; these provisions were first introduced into the Bill by the Senate Finance Committee. And since the Finance Committee recommended, and the Senate voted for, repeal of the estate tax,[14] the legislative history relating to the transferee provisions in the Senate deals only with Section 280 which provided for collection of income taxes from transferees. When the Bill went to conference the estate tax was restored and Section 316, relating to collection of estate taxes from transferees, was added as a cognate provision to Section 280. The report of the Conference Committee does not contain any detailed discussion of Section 316; it merely states that in general the explanation which it makes of Section 280 is also applicable to Section 316.[15] Thus in so far as Section 316 alone is concerned there is no legislative history pertaining directly to that section which intimates in the slightest degree that Congress intended to im-

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[14] S. Rep. No. 52, 69th Cong., 1st Sess., pp. 7–8 (1939–1 Cum. Bull. (Part 2) 332, 338–339).

[15] H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 50 (1939–1 Cum. Bull. (Part 2) 361, 376):

"Sections 316 and 317 of the estate tax title relate to the enforcement of the liability of transferees or fiduciaries in respect of an unpaid estate or gift tax and to the giving of notice to the Commissioner by fiduciaries of the assumption of their fiduciary capacity. In general the discussion under amendments Nos. 87 and 88 is applicable in explaining the effect of sections 316 and 317. Therefore a complete discussion is here omitted."

pose upon the transferee any personal liability for the estate tax or interest thereon. Nor does the history of Section 280 furnish any indication that Congress intended by that section to impose such a liability upon transferees with respect to income taxes.

As originally proposed by the Finance Committee, and then passed by the Senate, Section 280 contained a clause in subsection (c) providing that the transferee should not be liable for any "interest, additional amounts, or additions to the tax (other than those to which the taxpayer was liable and other than the interest specified hereinafter in subdivision (e) of this section)". Subdivision (e) provided that if, following a final Board decision and assessment of the tax, payment was not made within ten days after notice and demand by the Collector, interest should be imposed at the rate of one percent a month from the date of notice and demand until payment.

In explanation of this provision the Finance Committee said (S. Rep. No. 52, 69th Cong., 1st Sess., p. 30 (1939–1 Cum. Bull. (Part 2) 332, 354–355)):

> The liability which arises in the transferee in respect of the receipt of the assets is normally to be measured by the liability of the transferor at the time of the transfer. This would include the amount of the tax due plus all interest, additional amounts, and additions to the tax provided by law, up to the time of such transfer. The section, however, provides that the liability of the transferee in this amount shall not in turn be subject to interest, additional amounts, or additions to tax, save that in case the transferee petitions the Board

> for a redetermination of his liability, the amount so determined shall draw interest at the rate of 1 per cent a month commencing with notice and demand for payment following the final decision of the board.

The Senate may have had one of two possible meanings in mind. If in subsection (c) of Section 280 the words "to which the taxpayer was liable" (referring to interest which could be collected from the transferee) are construed, by emphasizing the word "was," as imposing a time limitation on the running of interest, then the Senate intended that interest on the tax owned by the transferor should stop running at the date of the transfer. If this is what the Senate meant the intention was changed when the Bill went to conference and was not carried out in the final enactment of the Bill.

The second possible meaning which the Senate may have had in mind was to make clear that the transferee's liability was only to pay what the transferor owned, including interest to the time of payment; no additional interest [16] was to be imposed upon the amount which the transferee should ultimately be required to pay over, that is, in the words of the Finance Committee, the "liability of the transferee shall not in turn be subject to interest." If this is what the Senate

[16] Except for the "non-payment interest" imposed at the rate of one percent per month for failure to pay within ten days after notice and demand by the Collector. This "non-payment interest" is the same interest which would be imposed upon the transferor for failure to pay after notice and demand. And as finally enacted Section 280 made it clear that even this "non-payment interest" is collected not as a personal liability of the transferee, but as part of the tax owing by the transferor.

meant, then the intention persisted through the final enactment of the Bill.

The dissenting opinion by Judge Turner in the *Koppers* case takes the view that the Senate had the first meaning in mind. We are inclined to the view that the Senate had the second meaning in mind and that the changes made by the Conference Committee were modifications in language only. It is unnecessary to resolve the point, however, for under either view it is plain that the Senate had no intention of imposing upon the transferee any personal liability for interest whatsoever.[17]

In the Conference Committee the Senate version of Section 280 was rewritten to the form in which it was finally enacted. The committee stated that its version "modifies the Senate amendment in the matter of interest and the statute of limitations for assessment of transferees." H. Conference Rep. No. 356, 69th Cong., 1st Sess., pp. 42–43 (1939–1 Cum. Bull. (Part 2) 361, 371). If Judge Turner's view as to the Senate's intent is correct then a substantive modification was made by the Conference Committee, namely, there was eliminated the provision that interest on the tax owed by the transferor should stop running at the date of the transfer. If our view as to the Senate's intent is correct, then the modifications made by the Conference Committee were in language only. But whether the changes made by the Conference Committee were substantive or only literary, as changed and as enacted, the

[17] With the possible exception of "non-payment interest" and as we pointed out in note 16, *supra*, even this interest was not made a personal liability of the transferee. In any event, no "non-payment interest" is involved in this case.

intent was clear that no new personal liability was being imposed upon the transferee and that the interest collectible from the transferee was only that which the transferor owed. The report describes the effect of the section in the following language (p. 43):

> Without in any way changing the extent of such liability of the transferee under existing law, the amendment enforces such liability "whether in respect of the tax as originally returned by the taxpayer or a deficiency therein" in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts.

And it goes on to say with respect to interest (p. 44):

> Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets. No further interest subsequently accrues upon such liability as assumed by the transferee, except the interest under section 276 (b) and (c) for failure to pay upon notice and demand after the outlined procedure has been completed and interest at 6 percent a year for reimbursing the Government at the usual rate for loss of the use of the money due it.

The reference in the above quotation to "interest at 6 percent a year * * * the usual rate" was, we think, to the interest imposed upon the transferor as the taxpayer under Section 274 (j) of the Revenue

Act of 1926,[18] for that is the only section providing for such interest on deficiencies, and, it may be observed that that interest runs from the date when the tax was due from the transferor and is "collected as a part of the tax." In the *Koppers* case Judge Turner took the view that this reference was to what we have referred to herein as "retention interest". But it is again unnecessary for the Court to resolve the point for no retention interest is involved in this case and under either interpretation of this reference in the report of the Conference Committee there is not the slightest iota of support for the Tax Court's view that any personal liability for either the tax or any of the ordinary interest thereon was intended by Congress to be imposed upon transferees.

As we pointed out earlier herein, it has long been well and definitely settled that no liability of any nature is imposed on anyone by Section 280 or Section 316 of the Revenue Act of 1926, or their counterparts in later Revenue Acts. We have nevertheless discussed the legislative history of these sections at some length because the majority opinion below places primary reliance upon that history. As we have shown there is nothing in that history to support a departure now from the long settled understanding of the meaning, nature and effect of the transferee provisions.

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[18] This is now Section 292 of the Internal Revenue Code. The cognate provision under the estate tax is Section 308 (h) of the Revenue Act of 1926 (now Section 891 of the Internal Revenue Code) which imposes interest at six percent on deficiencies from the date the tax was due and likewise provides that such interest shall be "collected as a part of the tax."

It follows both on principle and on authority that the taxpayer is not entitled to the deductions allowed by the Tax Court.

CONCLUSION

The decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted,

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